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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1351

EDUARDO ANGEL, ET AL., PETITIONERS

v.

EARL BUTZ, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35–40) is reported at 487 F. 2d 260. The opinions of the district court (Pet. App. 21–29, 30–34) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1973. A petition for rehearing was denied on December 7, 1973 (Pet. App. 41). The petition for a writ of certiorari was filed on March 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly sustained the validity of minimum wage-rate regulations issued by the Secretary of Agriculture pursuant to the Sugar Act as not being arbitrary, capricious, or an abuse of discretion.

STATUTES INVOLVED

Section 301(c)(1) of the Sugar Act of 1948, 7 U.S.C. 1131(c)(1), provides that the Secretary of Agriculture is authorized to make sugar subsidy payments, subject to the condition:

> That all persons employed on the farm in the production, cultivation, or harvesting of sugar beets or sugarcane with respect to which an application for payment is made shall have been paid in full for all such work, and shall have been paid wages therefor at rates not less than those that may be determined by the Secretary to be fair and reasonable after investigation and due notice and opportunity for public hearing; and in making such determinations the Secretary shall take into consideration the standards therefor formerly established by him under the Agricultural Adjustment Act, as amended, and the differences in conditions among various producing areas: *Provided, however,* That a payment which would be payable except for the foregoing provisions of this subparagraph may be made, as the Secretary may determine, in such manner that the laborer will receive an amount, insofar as such payment will suffice, equal to the amount of the accrued unpaid wages for such work, and that the producer will receive the remainder, if any, of such payment.

Section 403 of the Sugar Act of 1948, 7 U.S.C. 1153, provides:

> (a) The Secretary is authorized to make such orders or regulations, which shall have the force and effect of law, as may be necessary to carry out the powers vested in him by this chapter. Any person knowingly violating any order or regulation of the Secretary issued pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $100 for each such violation.
>
> (b) Each determination issued by the Secretary in connection with quotas and deficits under subchapter II of this chapter or payments under subchapter III of this chapter shall be promptly published in the Federal Register and shall be accompanied by a statement of the bases and considerations upon which such determination was made.

STATEMENT

The Sugar Act of 1948 (61 Stat. 922, as amended, 7 U.S.C. 1100, *et seq.*) provides that sugar producers are eligible for the subsidies authorized by the Act only if they pay their workers wages "at rates not less than those that may be determined by the Secretary [of Agriculture] to be fair and reasonable after investigation and due notice and opportunity for public hearing * * *." 7 U.S.C. 1131(c)(1). In implementing this provision, the Secretary conducts annual public hearings in sugar beet and sugarcane producing areas. See 7 C.F.R. 802.2. Following these hearings, the Secretary issues wage-rate regulations for the coming season (7 C.F.R. 862), together with a state-

ment of bases and considerations upon which his determination is based (*e.g.*, 39 Fed. Reg. 4752), as required by 7 U.S.C. 1153(b).

This action arises from the Secretary's refusal to adopt certain regulations proposed by petitioners at the 1969, 1970, and 1971 wage-rate hearings (Pet. 5-7).[1] These proposals included such matters as changing the categories of piecework operations specified in 7 C.F.R. 862.10, guaranteeing a minimum hourly wage rate as opposed to minimum rates per acre, and establishing a different grievance arbitration system. Also included were the petitioners' recommendations that sugar beet producers lose part or all of their subsidies if they knowingly employ illegal aliens, retaliate against workers who file grievances, fail to secure written contracts with workers, or fail to provide free, sanitary housing, health insurance, and an interstate travel allowance to workers. On behalf of the class of all sugar beet farm workers, petitioners contend that the Secretary's rejection of their proposals was arbitrary, capricious, and an abuse of discretion. They seek declaratory and injunctive relief invalidating the regulations (Pet. App. 37).

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[1] The Secretary adopted one of the proposals in 1970 (Pet. 5; 7 C.F.R. 862.10(b)), and two other proposals were adopted as a result of litigation. *Salazar* v. *Hardin*, 314 F. Supp. 1257 (D. Colo.) (7 C.F.R. 862.15); *Rodriguez* v. *Zimbelman*, 317 F. Supp. 921 (D. Colo.) (7 C.F.R. 862.13). In addition, each year the Secretary has increased the minimum hourly and piecework wage rates, so that the 1974 piecework rates (39 Fed. Reg. 4750) in some instances exceed those proposed by petitioners in 1971 (Cf. Pet. App. 36). The remaining fourteen proposals, however, have not been adopted by the Secretary (see Pet. App. 61–63).

The district court initially held that, contrary to the position set forth in the Secretary's statement of bases and considerations accompanying the 1971 wage-rate regulations (36 Fed. Reg. 5903–5904), the Secretary had the *power* under the Sugar Act to enact petitioners' proposals, including those relating to such non-monetary matters as housing (Pet. App. 21–29). Thereafter, the Secretary issued the 1972 regulations and, in the accompanying statement, stated that, despite the district court's holding, he was "still of the opinion that legal authority to issue such regulations [proposed by petitioners] under the Sugar Act is absent." 37 Fed. Reg. 7581 (Pet. App. 56). Nevertheless, the Secretary considered petitioners' proposals on the merits, and rejected them as "impractical and undesirable." 37 Fed. Reg. 7581 (Pet. App. 59). Reviewing this statement, the district court then found that the Secretary had not acted arbitrarily or capriciously, and that the regulations had a rational basis (Pet. App. 31–33). Accordingly, the court denied the petitioners' motion for summary judgment and granted the Secretary's motion for dismissal.

The court of appeals affirmed (Pet. App. 35–40). Without deciding whether the Secretary is authorized to regulate the non-monetary conditions of employment proposed by petitioners (Pet. App. 39), the court of appeals concluded that the Secretary's rejection of those proposals as impractical and undesirable, in the exercise of his rulemaking authority, was not arbitrary, capricious, or an abuse of discretion (Pet. App. 37–39). The court also held that, in issuing wage-rate regulations, the Secretary is not limited to considering

only the evidence presented at the public hearings (Pet. App. 38) and that, in view of the Secretary's contemporaneous explanation of the reasons for his rejection of petitioners' proposals, the record before the court need not contain everything considered by the Secretary in adopting the regulations (Pet. App. 38–39). Finally, the court held that the Secretary's rejection of petitioners' proposals on the merits was not invalidated by the fact that at the same time he reiterated his view that he had no authority to adopt them (Pet. App. 39–40).[2]

ARGUMENT

The court of appeals correctly affirmed the district court's entry of judgment for the Secretary, and petitioners' challenge to the reasons for affirmance stated in the opinion of the court of appeals does not present any issue warranting review by this Court.

1. No question is presented here concerning the statutory standard of judicial review applicable to the Secretary's action in promulgating wage-rate regulations under the Sugar Act. As the Act does not require that the Secretary base such regulations "on the record" after a hearing, the rule-making pro-

[2] While this action was pending in the district court, petitioners also sought to have some of their proposals implemented by legislation. The Senate, however, rejected their proposed amendments to the Sugar Act by vote of 59 to 34 (117 Cong. Rec. 27525–27528), and the House Committee on Agriculture did not recommend enactment of the proposals. See Hearings before the House Committee on Agriculture, on Extension of the Sugar Act, 92d Cong., 1st Sess., pp. 179, 185–188; H. Rep. No. 92–245, 92d Cong., 1st Sess.

ceedings were subject only to the less formal procedural requirements of 5 U.S.C. 553. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756–758; *United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 234–238.[3] Accordingly, the Secretary's action, as petitioners concede (Pet. 10, 12), is not subject to the "substantial evidence" or "de novo" review standards of the Administrative Procedure Act, 5 U.S.C. 706(2)(E), (F). See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 413–415; *Camp* v. *Pitts*, 411 U.S. 138, 140–142. As the court of appeals therefore correctly held (Pet. App. 38), the Secretary's action was to be sustained in this case unless it was shown by petitioners to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *." 5 U.S.C. 706(2)(A). See *Overton Park, supra*, 401 U.S. at 416; *Camp* v. *Pitts, supra*, 411 U.S. at 142.

2. Petitioners principally argue that the court of appeals' approach to the limited reviewing function of a court under 5 U.S.C. 706(2)(A) conflicts with this Court's decision in *Overton Park* and the decisions of other courts of appeals. Such conflict as exists, however, is more superficial than substantial, and does not require review by this Court.

A. Petitioners contend (Pet. 15–16) that *Overton Park* required the courts below to invalidate the regulation because the Secretary, in issuing it, may have relied upon some unspecified information not con-

[3] No question is presented as to the Secretary's compliance with 5 U.S.C. 553.

tained in the administrative record before the district court. This contention overlooks significant distinctions between *Overton Park* and the instant case.

In *Overton Park,* the administrative action challenged was the application of a very specific statutory standard to a particular set of facts; *i.e.,* whether there was any "feasible and prudent alternative" (23 U.S.C. 138; 49 U.S.C. 1653(f)) to construction of a highway through certain park land. Here the challenged action consists of a general policy determination that minimum wage rates prescribed by the Secretary are "fair and reasonable." 7 U.S.C. 1131(c)(1). The latter action, unlike the former, involves a legislative-type policy judgment not readily susceptible to evidentiary validation; in such cases courts have held, in applying *Overton Park,* that all matters relied upon by the agency need not be part of a formal administrative record and need not be brought before the court. *E.g., Delaware Citizens for Clean Air, Inc.* v. *Administrator,* 480 F. 2d 972, 976 (C.A. 3); *City of Chicago* v. *Federal Power Commission,* 458 F. 2d 731, 745–747 (C.A.D.C.), certiorari denied, 405 U.S. 1074; *California Citizens Band Ass'n* v. *United States,* 375 F. 2d 43, 54 (C.A. 9), certiorari denied, 389 U.S. 844.

In addition, in *Overton Park* the record before this Court contained no explanation by the Secretary of the basis for his approval of the highway nor any evidence of his consideration of the relevant factors. 401 U.S. at 408, 420. Here, by contrast, the regulations contain not only an explicit statement of their bases but also an explanation of the Secretary's reasons for rejecting petitioners' proposals (Pet. App. 51–60).

As this Court held in *Camp* v. *Pitts, supra,* a contemporaneous explanation of the "determinative reason for the final action taken," even if "curt," provides the basis by which the validity of the action must be judged. 411 U.S. at 143. In such a case, *Overton Park,* to the extent that it requires that gaps in the administrative record be filled in the court proceedings, is inapplicable. 411 U.S. at 142–143.

In any event, here there was before the district court a substantial record bearing on the Secretary's action, including a transcript of the 1971 public hearings on the proposed regulations, supplemental briefs and affidavits submitted by interested parties in connection with that hearing, and the deposition of the Department of Agriculture official responsible for promulgating the regulations. In addition, the record included a detailed specification of sources of information (in addition to public hearings) considered by the Secretary in promulgating the substantially similar sugar beet wage-rate regulations in prior years.[4]

Finally, it should be noted that in the district court both sides moved for summary judgment, contending that the validity of the Secretary's action could properly be adjudicated with reference to the statement of bases and considerations in the regulation and the other matters in the record before the court.[5]

[4] In view of the broad statutory standard of the Sugar Act and the correspondingly wide scope of the Secretary's authority under it, the court of appeals engaged in appropriately "thorough, probing, in-depth review" (*Overton Park, supra,* 401 U.S. at 415) of his action.

[5] Petitioners were not barred by any court ruling from seeking discovery concerning matters considered by the Secretary

B. Petitioners also contend that the decision below conflicts with *Overton Park* and with the decision of the District of Columbia Circuit in *D.C. Federation of Civic Associations* v. *Volpe*, 459 F. 2d 1231 (C.A.D.C.), certiorari denied, 405 U.S. 1030, in holding that the Secretary's consideration of "legally irrelevant and impermissible" factors (Pet. 17) did not invalidate his action. The claimed conflict, however, is not in fact presented in this case.

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that were not part of the record before the court. An agency's action "is entitled to a presumption of regularity" (*Overton Park*, *supra*, 401 U.S. at 415), and, absent a statute to the contrary (cf. 28 U.S.C. 2112), it is ordinarily the obligation of one challenging the validity of agency action to obtain and bring before the court evidence to overcome that presumption. The cases cited by petitioners (Pet. 16, n. 2) as requiring that the whole administrative record be provided to the court by the agency are all distinguishable, in that the district courts had blocked discovery efforts to obtain the matters relied upon by the agency (*Silva* v. *Lynn*, 482 F. 2d 1282, 1285 (C.A. 1); *Schicke* v. *Romney*, 474 F. 2d 309, 313–314, 319 (C.A. 2)); a special statute required the agency to rely upon only matters in the record or to present the record relied upon to the reviewing court (*Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F. 2d 495, 505–507 (C.A. 4); *Chrysler Corp.* v. *Department of Transportation*, 472 F. 2d 659, 668 (C.A. 6)); there was no administrative record before the court (*Scherr* v. *Volpe*, 466 F. 2d 1027, 1032 (C.A. 7); *Bradley* v. *Weinberger*, 483 F. 2d 410, 414 (C.A. 1)); or they contain only dicta, in that there was no suggestion that the agency relied upon matters not before the court or that the administrative record before the court was otherwise insufficient for determining the validity of the action taken. *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 470 F. 2d 289, 301 (C.A. 8), certiorari denied, 412 U.S. 931; *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 466 (C.A. 5); *American Fed'n of State, County, and Municipal Employees* v. *City of Cleveland*, 484 F. 2d 339, 384 (C.A. 6)). Moreover, most of the cases did not involve rule-making.

Petitioners' premise—that the Secretary's action was based on consideration of irrelevant factors—is not supported by the record. The asserted irrelevancy was not some form of extraneous political pressure, as in *D.C. Federation,* but rather consists of the Secretary's restatement of his position that he lacked statutory authority to accept particular regulations proposed by petitioners (Pet. App. 56). However, the Secretary stated that he had also considered the advisability of the proposed regulations on their merits—an assertion which stands uncontradicted on the record in this case—and there is no basis for concluding that the Secretary's consideration of the merits was affected by his view of the limits of his authority.

Accordingly, the court of appeals' discussion of this issue was essentially dictum. Indeed, all the court said was that, "*if* [the Secretary] * * * considered an alleged improper reason along with one that was proper, that action in itself does not establish that the result was arbitrary or capricious" (Pet. App. 40; emphasis supplied). The court did not accept petitioners' characterization of the Secretary's reference to doubts about his legal authority as constituting consideration of an "improper reason." Cf. *Schicke* v. *Romney,* 474 F.2d 309, 318 (C.A. 2)).[6]

[6] The Secretary's reference to his possible lack of authority as an alternative ground for rejecting petitioners' proposals was analogous to the settled practice of courts and agencies to state alternative and frequently unrelated grounds for their decisions, such as finding a lack of jurisdiction and alternatively rejecting a claim on the merits. In such circumstances, the existence or correctness *vel non* of one ground typically does not itself impair the validity of the alternative ground.

Finally, because this case involves the quasi-legislative action of rule-making, the validity of the Secretary's action would not necessarily have been affected even if he had considered irrelevant factors that might have tainted his action in applying a statutory standard to a particular set of facts, as the court in *D.C. Federation* recognized. 459 F. 2d at 1247.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
GERALD P. NORTON,
Assistant to the Solicitor General.
ROBERT E. KOPP,
ANTHONY J. STEINMEYER,
Attorneys.

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